SUPREME COURT, U.S.
FILED
AUG 27 1992
OFFICE OF THE CLERK

No. 92-204

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BANKERS TRUST NEW YORK CORPORATION AND CONSOLIDATED SUBSIDIARIES,

Petitioners,

-against-

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

O. PETER SHERWOOD,
Corporation Counsel of the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-0843 or 0835

EDWARD F. X. HART,*
STANLEY BUCHSBAUM,
AMY F. NOGID,
of Counsel.

August 27, 1992.
*Attorney of Record

BEST AVAILABLE COPY

20 pp

COUNTER-QUESTION PRESENTED

Whether a New York City tax, imposed pursuant to State authorization, for the privilege of doing business in a corporate or organized capacity is a franchise tax or other nonproperty tax in lieu of a franchise tax, so that it meets the express exceptions to the federal tax immunity statute, Rev. Stat. §3701, 31 U.S.C. 742.

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATE AND CITY LEGISLATION INVOLVED	2
Enabling Act	2
N.Y.C. Financial Corporation Tax	3
STATEMENT OF THE CASE	5
ARGUMENT	
THE DETERMINATION THAT THE CITY'S FINANCIAL CORPORATION TAX IS A FRANCHISE TAX WAS PROPER, SINCE IT FULLY COMPORTS WITH PRIOR PRONOUNCEMENTS OF THIS COURT CONCERNING WHAT CONSTITUTES A FRANCHISE TAX.	6
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page
City of Trenton v. State of New Jersey, 262 U.S. 182 (1923)	14
Colonial Pipeline Co. v. Traigle, Collector of Revenue of Louisiana, 421 U.S. 100 (1975) ...	7
Educational Films Corp. v. Ward, 282 U.S. 379 (1931)	8,10
Home Insurance Company of New York v. New York State, 134 U.S. 594 (1890)	7,10
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ...	9,11
Memphis National Gas Co. v. Stone, Chairman, State Tax Commission, 335 U.S. 80 (1948) ...	7
Missouri v. Lewis, 101 U.S. (11 Otto) 22 (1879)	13
Morgan v. Louisiana, 93 U.S. (3 Otto) 217 (1877)	7
North v. Russell, 427 U.S. 328 (1976) ..	13
Pacific Co., Ltd. v. Johnson, State Treasurer, 285 U.S. 480 (1932) ..	7
Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895)	11
Salsburg v. Maryland, 346 U.S. 545 (1954)	13

Cases (cont.) Page

Savings League of Wisconsin, Ltd. v. Wisconsin Department of Revenue, 141 Wis. 2d 918 (1987), appeal dismissed, 488 U.S. 806 (1988) 8

Society for Savings v. Coite, 73 U.S. (6 Wall) 594 (1867) 10

South Carolina v. Baker, 485 U.S. 505 (1987) 11-12

United States v. Wheeler, 435 U.S. 313 (1978) 14

Werner Machine Co. v. Director of Division of Taxation, 350 U.S. 492 (1956) 10

Weston v. City Counsel of of Charleston, 27 U.S. (2 Pet.) 449 (1829) 9,11

Statutes

12 Stat. 346 10

Rev. Stat. §3701, 31 U.S.C. §742 2,5,9

New York State Laws of 1966, ch.722 ... 2,7

New York State Laws of 1972, ch.167 ... 3

New York State Laws of 1972, ch.874 ... 4,6

New York State Laws of 1985, ch.907 4

New York State Tax Law §1451 3

Statutes (cont.) Page

New York City L.L. 83, 1972 4,6

New York City Administrative Code §R46-37.1 4,9

Secondary Materials

71 Am. Jur.2d State and Local Taxation §266 (1973) 8

Black's Law Dictionary 593 (5th Ed. 1979) 8

37 C.J.S., Franchises §1 (1943) 8

Joyce, A Treatise on Franchises (1909) 8,14

McQuillin, Municipal Corporations §34.03 (3rd ed. 1985) 8

24 N.Y. Jur., Franchises §1 (1962) 8

No. 92-204

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BANKERS TRUST NEW YORK CORPORATION AND CONSOLIDATED SUBSIDIARIES,

Petitioners,

-against-

DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK AND COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PRELIMINARY STATEMENT

Petitioners seek to have this Court review, by writ of Certiorari, an order of the New York State Court of Appeals, entered May 12, 1992, which unanimously affirmed an order of the New York State Supreme Court, Appellate Division, First Department, entered March 21, 1992. That

order unanimously confirmed the determination of the Commissioner of Finance of the City of New York, dated June 6, 1990, which determined that the City's Financial Corporation Tax is a franchise tax or, at the very least, a nonproperty tax in lieu of a franchise tax, within the meaning of Rev. Stat. §3701, 31 U.S.C. §742, and that, therefore, the City, is not precluded from including interest from federal obligations in measuring petitioner's tax liability.

STATE AND CITY LEGISLATION INVOLVED

1. Enabling Act.

(a)

New York Laws of 1966, Chapter 772, the enabling act authorizing the City to impose a Financial Corporation Tax states:

> **AN ACT to enable any city having a population of one million or more to raise tax revenue by authorizing the imposition of taxes on general, financial, insurance and transportation corporations and on unincorporated businesses *****

> Section 1. Notwithstanding any other provision of law to the contrary, any city having a population of one million or more acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing for any such city taxes on general corporations, financial corporations, insurance corporations and transportation corporations. The terms of such local law or local laws shall be, substantially, as follows, except that the appendix in such local laws may be amended for the purpose of conforming it with the United States internal revenue code or other federal law relating to taxation as presently in effect or as they may be amended[.]
>
> . . .

(b)

In 1972, New York State recodified its franchise tax on banks in Tax Law Article 32 (N.Y.Laws of 1972, ch. 167). In pertinent part, it provided:

> §1451. Imposition of Tax
>
> (a) For the privilege of exercising its franchise or doing business in this state in a corporate or organized capacity ...

2. **New York City Financial Corporation Tax.**

The City was given authority to amend its tax to conform to the State law by N.Y.Laws of 1972, Chapter 874. Pursuant to that authority, the City amended the imposition clause of the City's Financial Corporation Tax to read as follows (N.Y.C. Local Law 83, 1972):

N.Y.C. Admin. Code §R46-37.1[1]

> Imposition of tax.__(a) For the privilege of doing business in the city in a corporate or organized capacity, . . .

---

[1] The New York City Administrative Code was recodified without substantive change in 1985 by Chapter 907, Laws of 1985. The Financial Corporation Tax, previously found in Title R of Chapter 46, is now found in Title 11, Chapter 6.

STATEMENT OF THE CASE

Rev. Stat. §3701, 31 U.S.C. §742, provides that obligations of the United States are to be exempt from State or municipal taxes unless the State or municipal taxes are "nondiscriminatory franchise or other nonproperty taxes in lieu thereof." New York State authorized New York City to impose a franchise tax on financial corporations for the privilege of doing business in the City in a corporate or organized capacity. The Courts below unanimously concluded that the City's tax was a franchise tax within the meaning of the federal statute, and that the interest derived by petitioners from federal obligations was properly included in the income used to measure the tax.

There is no question that this Court is not bound by a state court's characterization of a tax when a federal right is concerned. However, since the basis for the State Court's

confirmation that the City tax was a franchise tax was correctly premised on this Court's pronouncements, the instant Petition for a Writ of Certiorari should be denied.

ARGUMENT

THE DETERMINATION THAT THE CITY'S FINANCIAL CORPORATION TAX IS A FRANCHISE TAX WAS PROPER, SINCE IT FULLY COMPORTS WITH PRIOR PRONOUNCEMENTS OF THIS COURT CONCERNING WHAT CONSTITUTES A FRANCHISE TAX.

(1)

New York City's Financial Corporation Tax is imposed pursuant to State authorization "for the privilege of doing business in the City in a corporate or organized capacity".[1]

Both the nature and operation of the tax indicate that the tax is imposed for a privilege.

---

[1] Although the Model Local Law in the original enabling act did not contain the words "in a corporate or organized capacity", those words were added by Local Law 83 of 1972 pursuant to a grant of State authority (N.Y.Laws of 1972, ch. 874).

This is in distinct contrast to New York City's Unincorporated Business Tax, which was authorized by the same enabling act (N.Y.Laws of 1966, ch. 722). That tax is imposed on an unincorporated business' net income, and not on the privilege of doing business.

For over one hundred years, this Court has considered a franchise tax to be a tax imposed for, or on, a privilege. See, e.g., Colonial Pipeline Co. v. Traigle, Collector of Revenue of Louisiana, 421 U.S. 100, 102, 111-12 (1975); Memphis National Gas Co. v. Stone, Chairman, State Tax Commission, 335 U.S. 80, 85-93 (1948); Pacific Co., Ltd. v. Johnson, State Treasurer, 285 U.S. 480, 490 (1932); Home Insurance Company of New York v. New York State, 134 U.S. 594, 599 (1890); Morgan v. Louisiana, 93 U.S. (3 Otto) 217, 233 (1877).

This determination, that a franchise tax is a tax imposed for a privilege, comports with the

definitions given by numerous scholars and commentaries. See, e.g., Black's Law Dictionary at p. 593 (5th ed. 1979) (franchise tax is tax on right and privilege of carrying on business in character of a corporation (emphasis added); 71 Am. Jur.2d State and Local Taxation §266 (1973); 24 N.Y. Jur., Franchises § 1 (1962); 37 C.J.S., Franchises § 1 (1943); McQuillin, Municipal Corporations § 34.03 (3d ed. 1985); Joyce, A Treatise on Franchises, §3 (1909).

One of the criteria for differentiating a "true" franchise tax from an income tax is whether the corporation will continue to be subject to the tax despite dissolution or cessation of business within the taxing jurisdiction. Educational Films Corp. v. Ward, 282 U.S. 379, 388 (1931); Savings League of Wisconsin, Ltd. v. Wisconsin Department of Revenue, 141 Wis.2d 918, 920 (1987) appeal dismissed, 488 U.S. 806 (1988). The City Tax

applies only to banking corporations that are doing business in the City. Admin. Code §R46-37.1(a).

(2)

The genesis of Rev. Stat. §3701, 31 U.S.C. §742 (1959), is this Court's decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), wherein the Supremacy Clause of the Constitution was construed as prohibiting a tax on federal obligations. This was followed by Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829), where the Court declared that a property tax on government obligations violated both the Borrowing and Supremacy Clauses on the ground that it impeded the federal government's ability to borrow money. In 1862, the prohibition against taxing United States' obligations was codified in connection with the issuance of $150,000,000 of treasury notes to finance the Civil War. It was then provided that "all stocks, bonds, and other

securities of the United States held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under State Authority." Act, February 25, 1862, C.33, 12 Stat. 346. But the prohibition against taxing those obligations was found not to be all-embracing. In Society for Savings v. Coite, 73 U.S. (6 Wall.) 594 (1867), this Court held that the imposition of a franchise tax passed constitutional muster, stating that "the privileges and franchises of a private corporation, and all trades and vocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government". See also, Werner Machine Co. v. Director of Division of Taxation, 350 U.S. 492, 494 (1956); Educational Films Corp. v. Ward, supra, 282 U.S. 379, 388-389 (1931); Home Insurance Company of New York v. State of New York, supra, 134 U.S. 594, 600 (1890).

This Court has recognized that the breadth of the intergovernmental tax immunity concept has been further circumscribed since the outset of the doctrine set forth in McCulloch v. Maryland, supra, 17 U.S. (4 Wheat.) 316. In South Carolina v. Baker, 485 U.S. 505, 520 (1987), this Court recognized that modern intergovernmental immunity case law had "thoroughly repudiated" the earlier notion. It acknowledged that a tax on interest from federal obligations or on income received by a party under a government contract burdened the government because the tax burden could be passed through to the government by increasing the cost of the contract or of borrowing funds. South Carolina explicitly overruled Pollack v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). This placed the vitality of Weston v. City Council of Charelston, supra, 27 U.S. (2 Pet.) 449 in serious doubt, since Pollack was premised on

the reasoning in Weston. In South Carolina v. Baker, supra, 485 U.S. at 518, the Court stated (485 U.S. at 526):

> Indeed, this Court has in effect acknowledged that a holder of a Government bond could constitutionally be taxed on bond interest in Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983), which involved a state tax on federal bond interest. Although the case involved an interpretation of 31 U.S.C. §742, we premised our statutory interpretation on the observation that "[o]ur decisions have treated §742 as principally a restatement of the constitutional rule." 459 U.S., at 397. We then stated: "Where, as here, the economic but not the legal incidence of the tax falls upon the Federal Government, such a tax generally does not violate the constitutional immunity if it does not discriminate against holders of federal property or those with whom the Federal Government deals." Ibid. (emphasis added).

The legal incidence of the City tax is not on the Federal Government nor is it discriminatory. The intergovernmental tax immunity doctrine is not compromised by the City's imposition, pursuant to State authorization, of a franchise tax which includes

in its measurement base interest from federal obligations.

(3)

The fact that the City, on its own, has no power to grant the corporate franchise does not preclude the State from delegating the right to tax the franchise to the City. Nor is it improper for the State to impose two franchise taxes. Just as it has the power to impose a franchise tax at double the amount of the existing one, it can impose both the existing tax and in addition thereto a separate tax in the same amount. Both taxes could apply to the entire State or one could be applied only to a limited geographical portion. North v. Russell, 427 U.S. 328, 338-339 (1976); Salsburg v. Maryland 346 U.S. 545, 550-554 (1954); Missouri v. Lewis, 101 U.S. (11 Otto) 22, 29-31 (1879).

Cities are political subdivisions of a state created, inter alia, as agencies for the exercise

of such governmental powers and functions of the state as may be entrusted to them. United States v. Wheeler, 435 U.S. 313, 320-21 (1978); City of Trenton v. State of New Jersey, 262 U.S. 182, 185-86 (1923). Whether the City rather than the State is the actual grantor of the franchise "to be" is irrelevant since it grants the privilege "to do" business in the City. The franchise "to do" is a franchise separate and apart from the franchise "to be". Joyce, A Treatise on Franchises, §39 at pp. 102-3 (1909).

The decision of the Court below correctly followed precedent established by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 27, 1992.

Respectfully submitted,

O. PETER SHERWOOD,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

EDWARD F. X. HART*,
STANLEY BUCHSBAUM,
AMY F. NOGID,
of Counsel.

* Attorney of Record.